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Order 27a

IN THE

Supreme Court of the United States

October Term, 1956

No.

JOSE SORIANO, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Prew Savoy, on behalf of Jose Soriano, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims dismissing the petition in the above-entitled cause, entered December 16, 1955.

OPINIONS BELOW

The opinion of the Court of Claims is based upon its Opinion in *Eleuterio Logronio* v. *The United States,* reported in 133 F. Supp. 395, which reversed its opinion in *Victorio* v. *United States,* reported in 106 F. Supp. 182, which superseded its opinion in *Victorio* v. *United States,* 91 F. Supp. 748.

JURISDICTION

The right to sue in the United States Court of Claims is found in sections 1491 and 2502 of the Judicial Code; Tit. 28 USCA, 1491, 2502.

The judgment of the United States Court of Claims was entered December 16, 1955. Application to the said Court for a Transcript of the Record was timely filed.

STATUTES—PRESIDENTIAL MILITARY ORDERS AND PROCLAMATIONS—MILITARY ORDERS

The Statutes, the Presidential Military Orders and Proclamations, and the Military Orders involved will be found in Appendices A to C.

QUESTION PRESENTED

Do the facts, as disclosed by the Record and admitted for the purpose of Defendant's Motion for Judgment on the Pleadings, under the Constitution of the United States and the laws and decisions applicable, establish:

That the personnel of the Philippine Army, called into the service of the armed forces of the United States by Military Order of the President of the United States, and subsequently by the Commanding Officer of the Armed Forces of the United States in the Philippines, who answered the call, did not surrender, but fought as organized guerrillas, who were subsequently recognized by the Commander-in-Chief of the armed forces of the United States in the Philippines, as authorized elements of United States Army Forces in the Far East, were part of the armed forces of the United States, so that the requisitions for their sustenance for which the requisitioning officers

agreed that the United States Army would pay created a debt of the United States for which the United States is liable?

STATEMENT

The facts are, as follows:

(1) Petitioner is of legal age, a citizen of the Republic of the Philippines, with residence and postal address at La Castellana, Negros Occidental, Philippines.

(2) Under the laws of the Republic of the Philippines, citizens of the United States can bring suits in the Courts of the Philippines against the Republic of the Philippines on express or implied contracts.

(3) Pursuant to authority of the Philippine Independence Act (March 24, 1934), 48 Stat. 456) and Sec. 2(a)(12) of the Ordinance appended to the Philippine Constitution, the Philippine Army was called and ordered into the service of the armed forces of the United States by Military Order of the Commander-in-Chief, President Franklin D. Roosevelt, dated 26 July 1941, and was integrated therein by general orders of the Commanding General of the United States Army Forces for the Far East, known in short as "USAFFE". (App. B & C)

(4) After the fall of Bataan and Corregidor, in 1942, elements of USAFFE refused to surrender to the military forces of the Imperial Japanese Government, which Government was then the enemy of the United States of America, (which we hereinafter refer to as the Enemy) and fled to the hills where they banded and organized themselves into guerrilla units and continued to wage military operations against the Enemy in accordance with the express or implied au-

thority of the Commander-in-Chief of the United States Army Forces Southwest Pacific Area, (USASPA) having sworn allegiance to the United States of America, until the liberation of the Philippines from the military control of the Enemy by the armed forces of the United States of America.

(5) Among the guerrilla units thus organized was the 1st Bn., 76th Infantry Regiment, 72nd Division, 7th Military District in the Island of Negros, Philippines, which unit continuously conducted military operations against the Enemy in accordance with the express or implied authority of the Commander-in-Chief of the United States Army Forces Southwest Pacific Area, its leader having sworn allegiance to the United States of America and the men having in turn been so sworn.

(6) In order successfully to prosecute military operations against the Enemy and in accordance with the Rules of Land Warfare published by the United States War Department and/or in accordance with the express or implied authority of the Commander-in-Chief of the United States Army Forces Southwest Pacific Area the aforesaid guerrilla unit, through its authorized officers, requisitioned, commandeered, and otherwise legally procured foodstuff and food supplies, equipment, goods and merchandise from various persons.

(7) Petitioner, at various times, from September, 1942, to January, 1945, delivered to the aforesaid guerrilla unit, through its authorized officers, various quantities and description of foodstuffs and food supplies, equipment, goods, and merchandise, the then reasonable market value of which equalled or exceeded

the total amount of Two Hundred Thirty-Nine Thousand and Five Hundred Thirty-One Pesos and Fifty Centavos (p239,531.50) currency of the Republic of the Philippines, or One Hundred Nineteen Thousand Seven Hundred Sixty-Five Dollars and Seventy-Five Cents ($119,765.75), United States currency. (An itemized statement showing the kind, quantity, and value of these various foodstuffs and food supplies, equipment, goods, other merchandise commandeered, the dates of the various requisitions by the authorized commandeering officers was attached to and made a part of the Petition to the United States Court of Claims and marked as Exhibit "A" thereto.)

(8) At the time the various foodstuffs and food supplies, equipment, goods and merchandise in Exhibit "A" were commandeered corresponding receipts were issued to the petitioner and it was clearly understood and agreed at the time of such commandeering that a legal obligation to pay was created thereby and that payment would eventually be made by the United States Army of which said unit was an authorized element.

(9) Upon the return of General Douglas MacArthur to the Philippines, the members of the 1st Bn., 76th Infantry Regiment, 72nd Division, 7th Military District were recognized by the Commander-in-Chief Southwest Pacific Area as authorized elements of the United States Army Forces in the Far East.

(10) Petitioner has not been paid for the above-mentioned foodstuffs and food supplies, equipment, goods and merchandise, and is justly entitled to the sum of One Hundred Nineteen Thousand Seven Hundred Sixty-Five Dollars and Seventy-Five Cents ($119,765.75).

(11) Petitioner filed a claim for payment of the commandeered property mentioned in Exhibit "A" with the Claims Service of the United States Army on March 30, 1948, which claim was, however, denied on June 21, 1948.

(12) There has been no assignment or transfer of this claim or any part thereof. There are no credits or set-offs thereto.

(13) The petitioner did not at any time and in any way voluntarily aid or give encouragement to the enemies of the United States and at the time the commandeerings were made the petitioner owed and bore true allegiance to the United States. At the present time petitioner owes allegiance to the Republic of the Philippines.

(14) Petitioner filed a petition in the United States Court of Claims on April 26, 1951.

(15) The United States Court of Claims, upon Defendant's Motion for Judgment on the Pleadings on the basis of its prior decision in *Eleuterio Logronio* v. *United States,* 133 F. Supp. 395, dismissed the petition on December 16, 1955.

(16) The claim in the *Logronio* case was barred in whole by the statute of limitations and, in addition, was barred in part by the finality provisions of the Missing Persons Act, which the Government had argued—"But instead of deciding this simple case on those simple grounds, the case is made the vehicle for overruling our former decision in the case of *Isidro Victorio* v. *United States,* 122 C. Cls. 708, (106 F. Supp. 182). That decision was arrived at unanimously, after normal deliberation. We have not been asked to over-

rule it. I think that decision was right and I cannot concur in the part of the instant opinion which overrules it." (Dissent of Judge Madden, concurring in the result.)

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Claims erred:

(1) In holding that the Philippine Army and the recognized Philippine guerillas (1st Battalion, 76th Infantry Regiment, 72nd Division, 7th Military District, in the Island of Negros, Philippines) called into the service of the armed forces of the United States, and who answered that call, were not part of the armed forces of the United States.

(2) In holding that the requisitions of the organized Philippine guerrillas—called into the service of the armed forces of the United States as part of the Philippine Army, who answered that call and who were recognized as elements of USAFFE, did not create a debt of the United States, for which the United States is liable.

(3) In failing to hold that the Philippine Army and the organized Philippine guerrillas called into the service of the armed forces of the United States, who answered that call, and who were recognized as elements of USAFFE, were part of the armed forces of the United States, so that their requisitions created a debt of the United States for which the United States is liable.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Claims is in Conflict With Decisions of Other Federal Courts Involving the Basic Question as to Whether Recognized Filipino Guerrilla Units Were Part of the Armed Forces of the United States

The Court of Claims, in *Eleuterio Logronio* v. *United States,* 133 F. Supp. 395, and upon which the dismissal of the petition in the subject case is based, held that the units of the Philippine Army "called into the service of the armed forces of the United States" by the Commander-in-Chief did not thereby become a part of the Army of the United States. Thus, the Filipino guerrilla units which were organized upon surrender of the Army, and which were recognized by the Commander-in-Chief of the United States Army, South Pacific area, in 1945, as "authorized elements of the United States Army forces in the Far East," were not a part of the Army of the United States. Therefore, the requisitions during 1942-1945 by their officers, who had sworn allegiance to the United States, and who promised that the United States Army would pay, did not create a debt of the United States for which the United States is liable.

The Court of Claims was not called upon to rule on this question, but did so on its own motion, though not necessary to its decision.

This decision is in conflict with the decision in *Petition of Agustin,* 62 F. Supp. 832, and with the *dictum* of the Court of Appeals for the First Circuit, in *United States* v. *Peter You Lo Chen,* 170 F. (2d) 307, which unqualifiedly approves of the decision of the District Court in the *Agustin* case.

In the *Agustin* case, the Court had before it Section 701 of the Nationality Act of 1940, as amended, the benefit of the provisions of which is restricted to a

person "who has served or hereafter serves honorably in the military or naval forces of the United States" during World War II. (App. A)

Agustin organized the Yay Regiment, Fil-Americans, a guerrilla band—after our surrender—and fought the Enemy. Upon General MacArthur's return to the Philippines, the Yay Regiment, Fil-Americans was recognized as an authorized element of the United States Army Forces in the Far East by the Commander-in-Chief, United States Army, South Pacific Area.

Upon the basis of these facts, the Court held that Agustin had served honorably in the military forces of the United States during World War II and was entitled to citizenship, the highest honor we can bestow.

The facts respecting the Yay Regiment, Fil-Americans, are not a bit different from those respecting the 1st Bn., 76th Infantry Regiment, 72nd Division, 7th Military District, in the Island of Negros, except as to locale.

Both guerrilla units were similarly organized and similarly recognized by the United States Army. They naturally could not be recognized by the Philippine Army—but only by the United States Army, as part of it.

Had the question been there presented, the Court would have had to hold that requisitions of supplies by Agustin created a debt of the United States for which the United States is liable.

In the case of *Peter You Lo Chen, supra,* the Court of Appeals, referring to the *Agustin* case and after reviewing the activities of the Yay Regiment and its

formal recognition by the United States Army as an authorized element of the United States Army Forces in the Far East, said:

> "The Court properly held that the informality of the circumstances of Agustin's enlistment did not obscure the fact of his honorable and distinguished service as commanding officer of a recognized element of the United States Army, and that petitioner was entitled to be admitted to citizenship."

While a conflict cannot arise on the question of liability of the United States for requisitions of guerrillas, as only the Court of Claims can have jurisdiction, it seems clear that there does exist a conflict on the fundamental question as to whether the recognized guerrillas were a part of the Army of the United States—a question which this Court should resolve; it is the crux of the ultimate question of liability of the United States.

II. The Question Involved Has National Importance

Counsel for Petitioner could unqualifiedly state from correspondence and conversations with Filipinos that a determination of the question involved by this Court is of importance to the United States. The frantic despair and discouragement of claimants who counted on repayment by the United States Army at the end of the War, as a result of the decision of the Court of Claims in *Logronio* v. *United States, supra,* (as well as in the *Victorio* decision of 1950), has resulted in a resentment towards the United States, which should have been, and still can be, avoided. The decision is clearly wrong.

The Respondent could equally well deny, as a matter of opinion, that the question is of importance to the United States.

They would both be opinions.

For this reason, counsel for Petitioner requested the opinion of the one person believed most qualified to express an opinion on the subject—General Carlos P. Romulo—representative of the Philippines to the United Nations, formerly Commissioner of the Philippines to the United States, and now Ambassador to the United States, who was in the Philippines during the occurrence of the events. His opinion, which should be persuasive, is found in Appendix D.

(1) What did the Filipino soldier think when the President of the United States, as Commander-in-Chief, ordered the Philippine Army into the service of the Armed forces of the United States?

"But there is a legal bond between us that serves to complement the moral and emotional bond. Our troops fought, not only as Filipino soldiers but as soldiers of the Army of the United States, as American nationals fighting in defense of the American flag on soil over which the United States had full sovereignty. When they fought, were wounded, were killed, they were Filipinos, yes, but they were also American nationals.

* * * * *

"When the Philippine Army was 'called into the service of the Armed Forces of the United States' by Military Order of the President of the United States and received its orders from General MacArthur, every single soldier—while defending his native soil—felt that he was defending the American flag—the United

States of America—as well as did any soldier from the mainland."

(2) What did the supplier of the guerrillas think when his property was requisitioned?

"The suppliers believed and, in my opinion, had every right to believe, that they were supplying guerrilla units of the American Army in defense of the United States and would be paid by the United States Army."

(3) Is the subject question of importance to the United States?

"These people strongly feel, rightly or wrongly, that they have suffered an injustice at the hands of the United States Army. They feel that they supplied the United States Army, were promised payment, and that the United States Army left the Philippines without giving them a full opportunity to present their claims and without paying its obligations. Among them, their friends and families, which are indeed numerous, this cannot help but create an ill feeling toward the United States which we all hope can be avoided. There are bound to be enough problems between our two countries without having one so based.

"They feel that the Court of Claims has done them a wrong because their claims have never been heard on the merits. They cannot believe that these were not debts of the United States and they hope that your Supreme Court will decide otherwise.

"Even if they now must turn to their Government for assistance and there, by reason of agreement between the two Governments are eventually repaid, they will feel that the United States Army and its

Courts did not meet their responsibility. The elements which from time to time will seek to estrange Filipinos from the United States should not be augmented by disillusioning and embittering those who so loyally came to the assistance of the Guerrilla units of the United States Army. For this reason, I consider the matter of national importance and possibly of eventual international importance to the United States."

We do know as Americans that the Philippines constitute an important bastion in any defense against Russia from the West, if only as part of the three prong defense Japan-Guam-Philippines.

It is respectfully urged that the question as to whether the recognized Filipino guerrillas were part of the Army of the United States so that their requisitions created a debt of the United States for which it is liable is of national importance.

III. The Case Involves a Novel and Important Question of Interpreting Two Acts of Congress and Presidential Orders Issued Pursuant Thereto Not Heretofore Passed Upon by This Court

In Section (1) of the Act of June 3, 1916, (App. A) Congress has defined the Army of the United States to include the Regular Army, the Volunteer Army, the Officers' Reserve Corps, the Enlisted Reserve Corps, the National Guard while in the service of the United States, and persons inducted into the land forces of the United States.

By Act of January 26, 1918, (App. A), Congress went further and provided as follows:

> "The militia and other locally created armed forces in the Philippine Islands *may be called into the service of the United States, and all mem-*

bers thereof may be drafted into said service and organized in such manner as is or may be provided by law for calling or drafting the *National Guard* into said service, and shall in all respects while therein be upon the same footing with members of the National Guard so called or drafted: * * *" (Italics supplied.)

This Act was never repealed but went out of existence in 1946 with the coming into being of the Independence of the Philippines.

President Woodrow Wilson, in 1918, issued the following Proclamation under that Act. (App. B).

* * * *

"Now, therefore, I, Woodrow Wilson, President of the United States of America, by authority of the powers conferred upon me by said Acts of Congress, do hereby *call into the military service of the United States to serve therein for the period of one month,* unless sooner discharged, as of and from the twentieth day of November, one thousand nine hundred and eighteen, *the members of one Infantry Division of the Philippine Guard, as organized under the Tables of Organization of the United States Army,* * * *". (Italics supplied.)

Thus, under the 1918 Act and the Proclamation of President Wilson, the unit of the Philippine Army so called into the military service of the United States in 1918 was part of the "Army of the United States", even though it was not so under the definition of "Army of the United States" in the Act of 1916.

Without repealing this Act or referring to it, Congress provided in Section (2)(12) of the Philippine Independence Act of 1934 (App. A), as follows:

"The Philippine Islands recognizes the right of the United States to expropriate property for

public uses, to maintain military and other reservations and *armed forces* in the Philippines, and, upon order of the President, to call into the service of *such armed forces* all military forces organized by the Philippine Government." (Italics supplied.)

President Franklin Roosevelt issued the following Military Order on July 26, 1941, under that Act and the corresponding provisions of the Ordinance appended to the Constitution of the Commonwealth of the Philippines:

"Under and by virtue of the authority vested in me by the Constitution of the United States, by section 2(a)(12) of the Philippine Independence Act of March 24, 1934 (48 Stat. 45), and by the corresponding provision of the Ordinance appended to the Constitution of the Commonwealth of the Philippines, and as Commander-in-Chief of the Army and Navy of the United States, I hereby call and order *into the service of the armed forces of the United States* for the period of the existing emergency, and place under the command of a General Officer, United States Army, to be designated by the Secretary of War from time to time, *all of the organized military forces of the Government of the Commonwealth of the Philippines:* * * *" (Italics supplied.)

December 18, 1941, General MacArthur then issued General Orders 46, implementing that Military Order, providing:

"1. Pursuant to provisions of the Proclamation of the President of the United States, dated July 26, 1941, all personnel of the Philippine Army on active duty and all active units of the Philippine Army, *less personnel and units already accepted for service with the United States*

Army Forces, are hereby called *into the service of the armed forces of the United States* in the Philippines, effective on the date of acceptance for the period of the existing emergency, *and will be accepted for such service of officers in the service of the United States Army Forces in the Philippines.*

"2. Personnel of the Philippine Army which may hereafter be called to active duty and units thereof which may hereafter be activated are hereby called into the service of the armed forces of the United States in the Philippines, effective on the date of acceptance, *and will be accepted for such service by officers in the service of the United States Army Forces* in the Philippines." (Italics supplied.)

On June 29, 1946, the organized military forces of the Commonwealth of the Philippines were released "from the services of the Armed Forces of the United States" by Military Order of the Commander-in- Chief of the Army and Navy, President Harry S. Truman, five days before the independence of the Philippines. (App. B).

Thus, if the unit of the Army of the Philippines was in the Army of the United States in 1918, it seems clear that the organized military forces of the Philippines called into the service of the armed forces of the United States on July 26, 1941, and released from such service on June 29, 1946, were part of the Army of the United States during that period.

The Court of Claims says that the organized military forces of the Philippines called into the service of the armed forces of the United States, in 1941, and the guerrillas recognized as elements of USAFFE, in 1945, were not a part of the United States Army.

The Court of Claims, in its now controlling decision, seeks to draw a distinction between the Act of 1918 and that of 1934 and the Military Orders issued pursuant thereto—to differentiate between the power to order the Philippine Army into the service of the United States Army and the power to order complete units of the Philippine Army into the service of the United States Army, or, in the alternative, to draft individual members into such service—as determining the question as to whether or not the person is in the Army.

The reasoning of the Court is fantastic—for in either case, whether as part of the Philippine Army, or of a unit thereof, or individually called, the person—the Filipino—is, in all events, under the military orders of the Commander-in-Chief of the United States Army, or an area commander. He is in the Army.

The two Acts in question, the Military Orders issued under them, and the legal consequences which flowed therefrom in the Philippines in World War II, have never been considered by this Court, and the opinion of the Court of Claims respecting them is so utterly wrong that it should certainly be reviewed.

Subsequent methods of payment, limitation of rights under G. I. legislation, provided by Congress, have nothing to do with the question.

IV. Failure to Take Jurisdiction and Render a Decision Upon the Merits Amounts to a Taking of Property Without Due Process of Law, Contrary to the Constitution

The decision of the Court of Claims in effect deprives of any legal remedy citizens of a friendly foreign government whose property was appropriated and used by

the United States Army in time of war in contravention of the Constitution.

(1) The Army has and had every right and power to requisition petitioner's property in the all-out war.

(2) Petitioner had and has every right to just compensation therefor upon an implied contract, or under the guarantees of the Fifth Amendment to the Constitution of the United States.

(3) Petitioner must first have demanded payment of the Army and have had payment refused before the claim accrued and before he could sue in the Court of Claims.

(4) The Army Claims Service was set up to receive such demands for payment and determine the claims for payment on their merits. (App. E)

(5) Petitioner was given an opportunity to demand payment, demanded payment of the Army before the Claims Service established for that purpose, and payment was refused.

(6) A timely suit was filed in the Court of Claims which denied the Petition on the grounds that the requisitions were not made by and for the Army of the United States. There was a strong, well-reasoned dissent.

The Fifth Amendment is available to aliens as well as to citizens of the United States. They cannot be deprived of their property without due process of law.

The ascertainment of due process is a judicial function. (*Monongahela Nav. Co.* v. *United States*, 148 U.S. 312; *Seaboard Air Line R. Co.* v. *United States*, 261 U.S. 299; *Brooks-Scanlon Corp.* v. *United States*,

265 U.S. 106; *Richmond Screw Anchor Co.* v. *United States,* 275 U.S. 331.)

The Court of Claims shirked its duty in holding it had no jurisdiction and in not hearing this case on the merits.

One asks:

May the Army procure and use in the Philippines supplies and materials, vitally needed in the national defense during a bloody war, and then close the courts to a hearing on the merits on a pure technicality—because the Guerrillas were not drafted and did not enlist in the United States Army, on a decision of the Court of Claims—when that Court has vacillated in its own decisions and when even its members are not in agreement?

This principle involved in the clear negative answer is, in substance, recognized by the Supreme Court in the case of the *Russian Volunteer Fleet* v. *United States,* 282 U.S. 481, reversing 68 C. Cls. (1928) 28, on Motion of the Government that the Court of Claims was without jurisdiction under the Judicial Code, sec. 155 (now 28 U.S.C.A. 2502).

In its opinion, by Mr. Chief Justice Hughes, the Court said that—

> "* * * . The Provision that private property shall not be taken for public use without just compensation establishes a standard for our Government which the Constitution does not make dependent upon the standards of any other governments. The act of Congress should be interpreted in the light of its manifest purpose to give effect to the constitutional guarantee." (282 U.S. 481, 492.)

To fail to allow claimants to have their claim considered on its merits would, to paraphrase the words of the Chief Justice, (282 U.S. 481, 488), mean that "although the United States has actually taken possession of the property and was enjoying the advantages of its use" in the national defense of the country, and the alien owner was unquestionably entitled to compensation at the time of the taking, had it been practical then to determine its value, it was the intention of our Government that recovery should be denied, or at least be indefinitely postponed, until the Congress made some provision for the determination of the amount payable other than through the Court of Claims.

The Court, in the *Agustin* case, *supra,* refused to apply the technical construction which such a conclusion requires.

This Court cannot possibly admit of such a conclusion.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a *writ of certiorari* should be granted.

PREW SAVOY
Counsel for Petitioner.

March 13, 1956.